

No. 12371

United States
Court of Appeals
For the Ninth Circuit.

F. E. THIBODO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Southern Division.

FILED

NOV 29 1948

PAUL P. O'BRIEN, J.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GEORGE W. CROUCH,
2125 Oak St.,
Los Angeles 7, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,
JOSEPH F. McPHERSON,
Special Assistant to the Attorney General,
807 U. S. Post Office &
Court House Bldg.
Los Angeles 12, Calif. [1*]

In the District Court of the United States, Southern
District of California, Southern Division

No. 1030-SD

F. E. THIBODO,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

A Sovereign Power,

Defendant.

COMPLAINT

(Injuries and relief incident to the Government depriving a citizen of his property in violation of constitutional right, and for declaratory relief.)

F. E. Thibodo, plaintiff, by George W. Crouch, his attorney, and complains of the United States of America, a sovereign power and for cause of action alleges:

I.

That the plaintiff is a native born citizen of the United States of America, and is a resident of the County of San Diego, State of California. That the real property, with respect to which vested rights of lien are hereinafter alleged in favor of the plaintiff, is situate in the said County of San Diego.

II.

That under and by virtue of Title 28, Section 1346, subdivision [2*] (2) of the Judicial Code of

* Page numbering appearing at top of page of original certified Transcript of Record.

the United States jurisdiction is duly conferred upon the District Court of the United States, by virtue of the duly enacted laws of the Congress of the United States, covering any court action against the United States in an amount not exceeding \$10,000 founded upon the Constitution of the United States, or upon any express or implied contract with the United States. That under and by virtue of the said Acts of Congress jurisdiction is conferred upon such United States District Court to grant declaratory relief coextensive with the limits of its jurisdiction otherwise. That by such laws it is likewise provided that any action seeking an adjudication respecting liens upon real estate must be brought in the District where such property is situate.

That the Fifth Amendment to the Constitution of the United States provides in part that no person shall be deprived of his property without due process of law; nor shall private property be taken for public use, without just compensation.

III.

That ever since the 24th day of August, 1931, the plaintiff was, and now is, the owner of certain street improvement bonds, duly issued in pursuance of the laws of the State of California, for the construction of a sanitary sewer in the City of National City, County of San Diego, California, and which, with the interest and penalties thereon, constitute a first lien upon the various lots and

parcels of land hereinafter more particularly set forth in subsequent paragraphs hereof. That each and every lot thereof is a part of the lands taken by the United States of America in attempted pursuance of law, and the right of condemnation accorded thereby, under a certain action instituted in the United States District Court for this District, and which bears No. 230-SD, and which has proceeded to judgment, and [3] the payment by the Government of the awards thereby imposed, all without service of process upon this plaintiff, any appearance by him, any compensation to him, or any adjudication respecting it, or any other act savoring of due process of law. That the said bonds have at all times since their issuance constituted a right of property, of substantial value, in favor of this plaintiff.

IV.

That on the 24th day of August, 1931, the City Treasurer of the City of National City, California, acting under and by virtue of an Act of the Legislature of the State of California, entitled, "An Act to provide for work upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities, and upon property and rights of way owned by municipalities or of which the municipality has possession and the right of use under the provisions of Section fourteen of article one of the constitution, and for establishing and changing the grades of any of such streets, avenues, lanes, alleys,

courts, places, sidewalks, properties or rights of way, and providing for the issuance and payment of street improvement bonds, to represent certain assessments for the cost thereof, and providing a method for the payment of such bonds," approved April 7th, 1911, and acts amendatory thereof,—duly made, issued and delivered to this plaintiff his street improvement bonds for the various amounts and as against the various lots as hereinafter particularized.

That said bonds were designated as "Series No. 41," and by their terms provided for the payment of interest at the rate of seven per cent, payable semi-annually at the office of said City Treasurer, the first payment to be on January 2nd, 1932, and thereafter on the first days of July and January of each year during the term thereof, all as represented by coupons attached [4] to each bond.

That said bonds extended over a period of nine years next succeeding the second day of January next succeeding the 15th day of the next November following their date. That each of said bonds covered a particularly numbered assessment therefore duly given, made and issued by the Street Superintendent of said City of National City, and which remained unpaid at the date of the issuance of said bonds.

That the principal of said bonds was payable at the office of the City Treasurer of the City of National City in ten annual installments on the

second day of January of each year, the first of which was January 2nd, 1932. That said bonds described each particupar parcel of land as hereinafter alleged and described, and said bonds by their terms provided, in pursuance of the provisions of said "Improvement Act of 1911," that the amount thereof, with interest and penalties, be, and the same shall remain a lien on the lands described therein until paid. That said bonds were otherwise in full accordance with the said Act of the said Legislature.

That nothing has ever been paid on said bonds, either of principal or interest.

V.

That the following is a description of said bonds with relation to the lands described therein, and which is arranged in such manner that it indicates which one of the parcels of land it pertains to as such parcels are numbered and set forth by the Government in its complaint in the said action No. 172-SD. That opposite the bond numbers, under appropriate headings, are shown the original principal amounts of each bond.

Gov't. Parcel	Property description	Bond Nos.	Amount
1	Lot 1 Block 123, including vacated alley		\$112.92
1	Lots 2 to 9 inclusive Blk 123, with vacated alley	419 to 426, inc.	} each for \$43.43
1	Lots 14 to 21, inc. Blk. 123, with vacated alley	427 to 434, inc.	} each for \$31.31
1	Lot 22, Blk 123, with vacated alley	435	\$8139

Gov't. Parcel	Property description	Bond Nos.	Amount
2	Lots 1 to 9, inc. Blk 124 with vacated alley	348 to 356 inc.	} each for \$43.43
2	Lot 10 Blk. 124, with vacated alley	357	\$112.92
2	Lot 13 Blk. 124 with vacated alley	358	81.39
2	Lot 14 to 22 inc. Blk 124 with vacated alley	359 to 367, inc.	} each for \$31.31
3	Lot 1 Blk. 125 with vacated alley	269	\$112.92
3	Lot 2 to 9 inc. Blk 125, with vacated alley	270 to 278, inc.	} each for \$43.43
3	Lot 13 Blk. 125, with vacated alley	279	\$57.33
3	Lots 14 to 21 inc. Blk 125 with vacated alley	280 to 287, inc.	} each for \$31.31
3	Lot 22 Blk. 125 with vacated alley	288	\$81.39
4	Lots 1 to 9 inc. Blk 126— with vacated alley	189 to 197 inc.	} each for \$43.43
4	Lot 10 Blk. 126, with vacated alley	198	\$112.92
4	Lot 13 Blk. 126 with vacated alley	199	81.39
4	Lots 14 to 21 inc. Blk. 126 with vacated alley	200 to 207 inc.	} each for \$31.31
4	Lot 22 Blk. 126, with vacated alley	208	57.33
8	Lot 22 Blk. 133	347	39.36
11	Lot 2 to 10, inc. Blk 135 with vacated alley	455 to 463	} each for
11	Lots 13 to 21 inc. Blk 135, with vacated alley	464 to 472 inc.	} each for \$43.43

All according to the Map of National City No. 348, filed in the office of the county recorder of San Diego County, Calif.

VI.

That by virtue of the terms of said "Improvement Act of 1911," it is provided that upon the

default of any payment of principal or interest upon said bonds, the City Treasurer shall immediately add a penalty of five per cent to the amount thereof, and on the first day of each and every month following such default shall add an additional penalty of one per cent upon such defaulted amount. That said Act further provides that the City on whose behalf such city treasurer issues such bonds shall be entitled to one-half of such first penalty of five per cent, and that all other penalties shall be paid to the owner of such bonds.

That the City of National City has no interest in any penalties with respect to the bonds here involved for the reason that the United States Government, in said action No. 172-SD made full settlement with such City and secured their acquittance.

That should it not follow by operation of law that under principles of fair compensation the plaintiff would not be [7] entitled to collect penalties as against the Government, then the plaintiff waives all such penalties.

VII.

That the amount involved in this action is less than the sum of \$10,000.

VIII.

That each of the said lots, as described in Paragraph V hereof, are, and were as of the date the Government took possession as hereinafter alleged,

of greater value than the total amount then due upon its respective bond.

IX.

That on or about the 9th day of February, 1943, the United States of America, in pursuance of the provisions of the various Acts of Congress in that behalf, brought an action in this District Court of the United States, bearing file No. 172-SD, to condemn various parcels of land in the City of National City, California, for the Government for the use of the United States Navy, to acquire the fee simple title thereto, and to adjudge the just compensation for the taking thereof. That on or about said date the duly constituted authority of the United States filed in said action their Declaration of Taking, and the Court made its order of possession in pursuance thereof. That thereupon the defendant entered into possession and has ever since been in possession thereof. That the property described in the bonds of the plaintiff, as set forth in Paragraph V hereof, lies within the area of the property that the defendant so too and so holds possession thereof. That plaintiff was neither a party to said action 172-SD, nor was he served with summons. That no provision has been made for the payment of the bonds of the plaintiff, and no adjudication has been made respecting it. That plaintiff has never received any compensation for such bonds. That the defendant refuses to pay plaintiff anything in lieu [8] thereof.

X.

That there has never been any other action or proceeding on the part of the United States to determine the rights of property of this plaintiff.

Wherefore plaintiff prays:

1. For judgment against the United States of America for a sum of money amounting to the total of the principal sums of the bonds described in this complaint with interest thereon at the rate of seven per cent per annum from August 24th, 1931 to February 9th, 1943, the date the Government entered into possession.

2. That it be decreed that each bond constitutes a separate lien upon the property described therein, and shall remain a lien until it be paid.

3. That a declaration be made of the rights of the parties.

4. For costs, and for such general, other and further relief as may follow in the due course of law.

/s/ GEORGE W. CROUCH,
Attorney for Plaintiff. [9]

State of California,
County of San Diego—ss.

F. E. Thibodo being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as

to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ F. E. THIBODO.

Subscribed and sworn to before me this 19th day of November, 1948.

[Seal] /s/ ELSIE H. CRENSHAW,

Notary Public in and for the County of San Diego,
State of California.

My commission expires Mar. 31, 1951.

Copy received.

[Endorsed]: Filed Nov. 23, 1948. [10]

[Title of District Court and Cause.]

JOINT AND CONSOLIDATED MOTION TO
DISMISS, MOTION TO STRIKE, AND
MOTION FOR MORE DEFINITE STATE-
MENT

Motion To Dismiss

Comes Now the United States of America, defendant herein, and moves the Court to dismiss the action on the grounds that:

1—The Complaint fails to state a claim against the United States.

2—The Complaint fails to state a claim upon which relief can be granted.

3—This Court lacks jurisdiction of the subject matter of this action, in that the amount actually in controversy is in excess of \$10,000.00 as more clearly appears from the certified statement of W. C. Van Sant, City Treasurer of the City of National City, marked Exhibit “A” and attached hereto.

4—There is another action, to wit, Case No. 172-SD Civil, being United States of America v. 123.466 Acres of Land, etc., jurisdiction over which still remains in this District Court, and pursuant to which any claim available to plaintiff herein by reason of the aforesaid condemnation proceedings can be raised and adjudicated. [11]

Plaintiff herein had actual and constructive notice of this cause such as to put him upon inquiry, and his failure to make such inquiry and pursue his remedy prior to the date of filing of this action constitute laches and estop him from now so doing.

5—Any cause of action available to plaintiff herein pursuant to Section 1346(a(2)) of the Judicial Code is barred by the Federal Statute of Limitations pertaining to said claims.

6—Any cause of action available to plaintiff herein is barred by the Statute of Limitations of the State of California which affect the cause herein.

Motion To Strike

Subject to the ruling of this Court upon the foregoing Motion to Dismiss and reserving all rights

thereunder, defendant moves the Court to strike from the Complaint the following portions thereof, and for the reasons set out herein:

1—Paragraph I through X, inclusive, and each and every one of them, in that the mentioned paragraphs of said Complaint:

(a) Are so vague, ambiguous and of such sweeping generalization that defendant is wholly unable to respond or answer or otherwise plead thereto.

(b) Do not set forth with particularity facts upon which, under any theory, plaintiff can invoke the aid and protection of the Constitution or laws of the United States, and upon which relief responsive thereto could be granted.

(c) Do not establish the jurisdictional basis for said action in that nowhere does plaintiff cite the constitutional provisions or other laws of the United States which establish his right to bring this particular action, in this particular form, or the duties and obligations of the United States arising thereunder, or to sue in this forum.

(d) Are indefinite, ambiguous, unintelligible and uncertain for the reasons aforesaid.

2—Paragraph II, lines 14 to 17, inclusive, page 2, in that the same is merely expository, there is no statement or claim within the Complaint that said [12] Complaint is predicated thereon, and for the further reason that citation of Title 28, Section 1346, Subdivision 2, indicates the Complaint is

based upon a claim independent of the aforesaid condemnation proceedings, and for the further reason that said statement is immaterial, redundant, and surplusage.

3—The whole of Paragraph III of said Complaint, and each and every allegation therein, in that said paragraph is redundant and surplusage, does not state ultimate facts upon which to predicate a claim against the United States, and states legal conclusions.

4—The whole of Paragraph IV, and each and every allegation contained therein, because said paragraph is immaterial, redundant and inpertinent as to any issues between the parties, and, taken in context, states no basis for a claim against the United States.

5—The whole of Paragraph VI, and each and every allegation contained therein, because said paragraph is immaterial, redundant and inpertinent as to any issues between the parties, and, taken in context, states no basis for a claim against the United States.

6—The whole of Paragraph VII in that the amount actually in controversy is in excess of \$10,000.00.

7—The whole of Paragraph VIII of the Complaint, and each and every allegation therein contained, for the reasons that said paragraph is a legal conclusion, is not a pleading of ultimate facts,

is immaterial and surplusage, and, taken in context, states no basis for a claim against the United States.

8—The whole of Paragraph IX, and each and every allegation therein contained, for the reason that they are redundant and immaterial to the claim raised by plaintiff herein, and that said paragraph, and each and every allegation therein, nowhere states or indicates that plaintiff herein has performed each and every act necessary to secure his rights in the condemnation proceedings, the failure of recognition of which might serve as a basis for a claim against the United States under Title 28, Sec. 1346 of the Judicial Code.

9—The whole of Paragraph X, and each and every allegation therein contained, for the reason that the same is immaterial and impertinent to any issues herein, and, taken in context, furnishes no basis for a claim against the United States [13] pursuant to Title 28, Section 1346 of the Judicial Code.

Motion For A More Definite Statement

Subject to the ruling of this Court upon the Motion to Dismiss and Motion to Strike, and reserving all rights thereunder, defendant moves the Court to require that plaintiff herein make his Complaint more definite in the following particulars:

1—Let him state the particular clause of the Constitution of the United States, or other law of the United States, which serves as a basis for his Complaint, in addition to the jurisdictional requirements of Title 28, Sec. 1346, Subdivision 2 thereof.

2—Let him state whether said cause is based upon express or implied contract with the United States, and if so based, let him state the facts upon which he predicates such a claim.

3—Let him state whether payment for the bonds set forth in Paragraph IV of his Complaint was ever demanded, and by whom, and upon what date.

4—Let him state the value as claimed by him, of each of the lands, set forth in Paragraph V of his Complaint, and referred to in Paragraph VIII thereof.

5—Let him state when, if ever, demand was made of defendant herein, upon whom said demand was served, and where, when, and by whom such refusal to pay was made, all as is alleged by him in Paragraph IX.

6—Let him state whether he has ever sought compensation in the condemnation proceedings referred to in Paragraph IX, and, if so, when and where, and by whom denial thereof was made.

7—Let him state the proceedings instituted by him to recover his just compensation pursuant to said condemnation proceeding, or if none, such pro-

ceedings as may have been instituted by him to secure restitution of those amounts alleged to have been improperly paid to other persons entitled to a proportionate share of said compensation arising out of the aforesaid condemnation proceedings. [14]

Dated this 24th day of February, 1949.

JAMES M. CARTER,
United States Attorney.

By /s/ COLLMAN E. YUDELSON,
Special Attorney, Lands Division Department of
Justice,

Attorneys for Defendant.

EXHIBIT "A"

February 7, 1949.

To Whom it May Concern:

I, C. W. Vansant, City Treasurer of City of National City, California, hereby certify that the attached is a correct statement of the amount of money that would have been required to cancel the Improvement Bonds listed thereon on February 9th, 1943.

/s/ C. W. VANSANT.

State of California,
County of San Diego,
City of National City—ss.

On this 7th day of February, 1949, before me, Frank W. Rogers City Clerk in and for City of National City, County of San Diego, State of California, residing therein, duly commissioned and

Series #41 Bond No.	Col. A Original Amount	Col. B Penalties	Col. C Interest	Col. D Total Due Feb. 9, 1943
355	\$ 43.43	\$ 49.81	\$ 14.78	\$108.02
356	43.43	49.81	14.78	108.02
357	112.92	129.54	38.45	280.91
358	81.39	93.43	27.70	202.51
359	31.31	35.93	10.66	77.90
360	31.31	35.93	10.66	77.90
361	31.31	35.93	10.66	77.90
362	31.31	35.93	10.66	77.90
363	31.31	35.93	10.66	77.90
364	31.31	35.93	10.66	77.90
365	31.31	35.93	10.66	77.90
366	31.31	35.93	10.66	77.90
367	57.33	65.79	19.52	142.64
269	112.92	129.54	38.45	280.91
270	43.43	49.81	14.78	108.02
271	43.43	49.81	14.78	108.02
272	43.43	49.81	14.78	108.02
273	43.43	49.81	14.78	108.02
274	43.43	49.81	14.78	108.02
275	43.43	49.81	14.78	108.02
276	43.43	49.81	14.78	108.02
277	43.43	49.81	14.78	108.02
278	43.43	49.81	14.78	108.02
279	57.33	65.79	19.52	142.64
280	31.31	35.93	10.66	77.90
281	31.31	35.93	10.66	77.90
282	31.31	35.93	10.66	77.90
283	31.31	35.93	10.66	77.90
284	31.31	35.93	10.66	77.90
285	31.31	35.93	10.66	77.90
286	31.31	35.93	10.66	77.90
287	31.31	35.93	10.66	77.90
288	81.39	93.42	27.70	202.51
189	43.43	49.81	14.78	108.02
190	43.43	49.81	14.78	108.02
191	43.43	49.81	14.78	108.02
192	43.43	49.81	14.78	108.02
193	43.43	49.81	14.78	108.02
194	43.43	49.81	14.78	108.02
195	43.43	49.81	14.78	108.02
196	43.43	49.81	14.78	108.02
197	43.43	49.81	14.78	108.02
198	112.92	129.54	38.45	280.91
199	81.39	93.42	27.70	202.51
200	31.31	35.93	10.66	77.90
201	31.31	35.93	10.66	77.90

Series #41 Bond No.	Col. A Original Amount	Col. B Penalties	Col. C Interest	Col. D Total Due Feb. 9, 1943
202	\$ 31.31	\$ 35.93	\$ 10.66	\$ 77.90
203	31.31	35.93	10.66	77.90
204	31.31	35.93	10.66	77.90
205	31.31	35.93	10.66	77.90
206	31.31	35.93	10.66	77.90
207	31.31	35.93	10.66	77.90
208	57.33	65.79	19.52	142.64
455	43.43	49.81	14.78	108.02
456	43.43	49.81	14.78	108.02
457	43.43	49.81	14.78	108.02
458	43.43	49.81	14.78	108.02
459	43.43	49.81	14.78	108.02
460	43.43	49.81	14.78	108.02
461	43.43	49.81	14.78	108.02
462	43.43	49.81	14.78	108.02
463	43.43	49.81	14.78	108.02
464	43.43	49.81	14.78	108.02
465	43.43	49.81	14.78	108.02
466	43.43	49.81	14.78	108.02
467	43.43	49.81	14.78	108.02
468	43.43	49.81	14.78	108.02
469	43.43	49.81	14.78	108.02
470	43.43	49.81	14.78	108.02
471	43.43	49.81	14.78	108.02
472	43.43	49.81	14.78	108.02
418	112.92	129.54	38.45	280.91

(Lot 1 Blk. 123)

(Par. 12 S. 1012)

Total	4,288.85	4,916.29	1,458.94	10,664.08
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[Endorsed]: Filed Feb. 24, 1949. [18]

[Title of District Court and Cause.]

JUDGMENT AND ORDER OF DISMISSAL

The above entitled cause came on regularly for hearing and argument on the 7th day of June, 1949, on the defendant's Joint and Consolidated Motions to Dismiss to Strike, and for a More Definite State-

ment, and there appearing on behalf of the plaintiff, F. E. Thibodo, his attorney of record, George W. Crouch, and on behalf of the defendant, United States of America, one of its attorneys of record, Collman E. Yudelsohn, and the said matter then being orally argued and presented upon said oral arguments and upon the Memoranda of Points and Authorities submitted herein, and the case being then fully submitted to the Court,

The Court Finds:

I.

That plaintiff herein, although a proper, was not a necessary party to the condemnation proceedings affecting the real property which is the subject matter of the instant action, and which was involved in case [19] No. 172-SD Civil, entitled "United States of America v. 107.28 Acres of Land in the City of San Diego, etc. et al.," and there was no necessity for the United States to serve plaintiff herein or to make him a party-defendant in the aforesaid condemnation proceeding; and that, accordingly, plaintiff herein was not entitled to be heard in the matter of the determination of just compensation for the condemnation and taking of the real property in said condemnation proceeding.

II.

That the bond register maintained in the office of the County Treasurer, as provided for by the Public Improvement Act of 1911, and acts amenda-

tory thereof, and the California Street and Highway Code, Section 6400, et seq., is not such a public record as constitutes either actual or constructive notice to the United States of America of the existence of the claims of this complainant arising out of the ownership of Public Improvement Street Lien Bonds.

III.

That the Complaint herein does not state facts sufficient to constitute a cause of action against the United States of America.

It Is Accordingly Ordered And Adjudged that the defendant's Motion to Dismiss be granted and the Complaint herein is dismissed without leave to the complainant thereof to plead further.

Dated: This 20th day of June, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Presented by :

JAMES M. CARTER,
United States Attorney.

By /s/ COLLMAN E. YUDELSON,
Special Attorney, Lands Division Department of
Justice.

Judgment entered June 21, 1949.

Docketed June 21, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1949. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFF TO
THE UNITED STATES COURT OF AP-
PEALS, FOR THE NINTH CIRCUIT

To the United States of America, Defendant, and
to its attorneys, James M. Carter, United States
Attorney, and Collman E. Yudelso, Special
Attorney, Lands Division, Department of Jus-
tice:

Take Notice that the Plaintiff, F. E. Thibodo,
does, on this 27th day of July, 1949, hereby appeal
to the United States Court of Appeals, for the
Ninth Circuit, from the judgment of dismissal, in
favor of the defendant, and against plaintiff, en-
tered on June 21, 1949, in judgment book 14, at
page 489, and from the whole of such judgment,
wherein it was ordered and decreed that the plain-
tiff's complaint be dismissed, without leave to the
complaining to further plead.

/s/ GEORGE W. CROUCH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 27, 1949. [21]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
THE TIME FOR,

- (1) The filing of the record on appeal and the docketing of the appeal. (2) The filing of the designations of the portion of the record and proceedings to be contained in the record on appeal. (3) The designation by the appellant of the points on which he intends to rely on the appeal.

Whereas notice of appeal from the judgment in the above entitled action was duly served and filed on July 27th, 1949, and counsel are of the opinion that there is extraneous matter in the normally [23] constituted record on appeal that ought to be eliminated, and that there are other things that can be provided that will assist in the clarification and presentation of the issues upon the appeal.

It is understood that such stipulation on the part of the Government must first be approved by the Appellate Division at Washington; that such body usually requires a reporter's transcript of the proceedings had; that the Court Reporter Henry Dewing, who officiated in this case, is still away on vacation. Therefore, in order that there be sufficient time for the parties to enter into such a stipulation, the extensions of time hereinafter provided are agreed to. The parties report to the Court that such tentative stipulation between counsel for the plain-

tiff and Government counsel at Los Angeles has been arrived at. Hence it is now stipulated:

1. That the record on appeal as provided by Rules 75 and 76 may be filed with the United States Court of Appeals, for the Ninth Circuit, and there docketed within ninety (90) days from July 27, 1949.

2. That the appellant may within 45 days from July 27, 1949, serve upon the appellee and file with this District Court a designation of the portions of the record, and the proceedings, to be contained in the record on appeal, plus any reporters transcript.

3. That within 55 days from July 27, 1949, the appellee may likewise serve and file a designation of any additional portion of the record and proceedings to be included in the record on appeal.

4. That within 45 days from July 27, 1949, the appellant shall serve and file a concise statement of the points on which he intends to rely upon appeal.

5. That should counsel for appellant at any time conclude that the negotiations leading to such stipulation for diminution [24] of the record will prove to be fruitless, then he shall, from thence forward, be free to proceed as though this stipulation had never been entered into, but nevertheless being en-

titled to the benefit of the delays, that have in the meantime ensued.

Dated July 29, 1949.

/s/ GEORGE W. CROUCH,

Attorney for Plaintiff.

United States of America,

By JAMES M. CARTER,

United States Attorney,

By /s/ JOSEPH F. McPHERSON,

Defendant.

ORDER

The extensions of time, as above stipulated, are hereby ordered.

Dated August 1, 1949.

/s/ LEON R. YANKWICH,

U. S. District Judge.

Copy received.

[Endorsed]: Filed Aug. 1, 1949. [25]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH THE APPELLANT, F. E. THIBODO, IN- TENDS TO RELY, ON THE APPEAL.

The Appellant, F. E. Thibodo, will, on the appeal, rely on the following points:

1. That the action of the trial court in granting the Government's motion to dismiss, and entering a judgment of dismissal without leave to further plead,

results in depriving the plaintiff of property, without due process of law, and takes from him his private property for public use without compensation, in violation of the provisions therefor guaranteed to all persons by the Fifth Amendment to the Constitution of the United States.

2. That the finding of the trial court, as set forth in said judgment, that the plaintiff was not a necessary party to a condemnation proceeding to acquire the property covered by the lien of his bonds, and not entitled to be heard in the matter of the determination of just compensation for the taking of such property, [26] is contrary to law.

3. That the finding of the trial court, as set forth in said judgment, that the bond records of the City Treasurer, as provided by the Improvement Act of 1911, are not such public records as constitute actual or constructive notice to the United States, of the existence, or ownership of street improvement bonds, is contrary to law, as specifically provided.

4. That the finding of the trial court, as set forth in said judgment, that the plaintiff's complaint does not state facts sufficient to constitute a cause of action against the Government, is contrary to law.

5. That the reporter's transcript of the hearing upon the motion to dismiss, discloses that the Court's determination was in part based upon the

assumption that the plaintiff's action is a suit under the Tort Claims Act, whereas it is in truth a suit upon implied contract, arising under the Fifth Amendment to the Constitution, and one with respect to which the District Court has jurisdiction under Title 28 Section 1346-2 of the Judicial Code.

6. That the said judgment of dismissal, in all its important findings and decrees, is contrary to law.

Respectfully submitted,

/s/ GEORGE W. CROUCH,
Attorney for Plaintiff
and Appellant.

Dated Sept. 6, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 7, 1949. [27]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON- TENTS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

Please prepare the record on appeal in the above entitled action. Such record shall include:

1. The Plaintiff's complaint.
2. The defendant's motion to dismiss, entitled "joint and consolidated motion to dismiss, motion to strike, and motion for more definite statement."
3. The "judgment and order of dismissal."

4. The Court reporter's transcript of all that transpired at the hearing of the defendant's motion to dismiss, held at San Diego, California, on June 7, 1949.

5. Your certificate to the effect that no hearing took place other than that of June 7, 1949, that no witnesses were sworn or testified, no documentary evidence was received or filed, and that [29] there is no stipulation on file respecting either admissions or evidence.

6. The notice of appeal with its date of filing.

7. The stipulation entered into extending the time for (1) the filing of the record on appeal and the docketing of the appeal, (2) the filing of the designations of the portion of the record and proceedings to be contained in the record on appeal, and (3) the filing by the appellant of a concise statement of the points on which he intends to rely upon appeal.

8. The statement of the points on which the appellant intends to rely upon appeal.

9. The designations filed by the parties as to the matter to be included in the record.

Respectfully submitted,

/s/ GEORGE W. CROUCH,

Attorney for Appellant.

Dated Sept. 7, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 7, 1949. [30]

[Title of District Court and Cause.]

APPELLEE'S COUNTER-DESIGNATION
OF THE RECORD ON APPEAL

To the Clerk of the above entitled Court:

Comes Now the United States of America, appellee, and by way of a counter-designation and as an addition to appellant's designation of the contents of record on appeal, designates the following additional portion of the record, to-wit:

1. Exhibit "A" which is annexed to the Motion to Dismiss, entitled "Joint and Consolidated Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement," and which Exhibit "A" consists of a statement over the signature of C. W. Vansant, City Treasurer of the City of National City, California, dated February 7, 1949, and two pages of five columns of figures.

2. This counter-designation.

Dated: September 21, 1949.

JAMES M. CARTER,
United States Attorney.

By /s/ IRL D. BRETT,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 21, 1949. [32]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain the original Complaint; Joint and Consolidated Motion to Dismiss, Motion to Strike and Motion for More Definite Statement; Judgment and Order of Dismissal; Notice of Appeal; Stipulation and Order Extending Time for Filing Record and Docketing Appeal etc.; Statement of Points on Which Appellant Intends to Rely on Appeal; Appellant's Designation of Contents of Record on Appeal and Appellee's Counter-Designation of the Record on Appeal which, together with Reporter's Transcript of Proceedings on June 7, 1949 consisting of pages 1 to 11, inclusive, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that no hearing took place, other than that on June 7, 1949; that no witnesses were sworn or testified; no documentary evidence was received or filed and there is no stipulation on file respecting either admissions or evidence.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of September, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy. [34]

United States District Court in and for the Southern
District of California, Southern Division

No. 1030-SD Civil

F. E. THIBODO,

Plaintiff,

vs.

UNITED STATES OF AMERICA, A Sovereign
Power,

Defendant.

Honorable Leon R. Yankwich,
Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

San Diego, California
Tuesday, June 7, 1949

APPEARANCES

For the Plaintiff:

GEO. W. CROUCH, Esq.
2125 Oak Street,
Los Angeles 7, California.

For the Defendant:

COLLMAN E. YUDELSON,

Special Attorney, Lands Division,

Department of Justice.

The Court: This is an attempt to bring this action under the Tort Claims Act. I will say frankly that I am somewhat familiar with the Tort Claims Act. I am in the process of writing a lecture to be given before the Conference of Judges, at Los Angeles, a portion of which lecture I gave before the Long Beach Bar a week ago Friday.

In looking at this complaint, I can't see why counsel thinks an action of this character comes within that.

Mr. Crouch: Because the Fifth Amendment provides that nobody can be deprived of his property without compensation. I am complaining of the act of the government in taking property on which I have liens, and doing so by suit in which they do not make me a party of record.

The Court: The mere fact that you own bonds does not make you a party to the action.

Mr. Crouch: What about a lessee?

The Court: The lessee is not a party. As a matter of fact, the government is not interested. Sometimes the lessee claims greater value to his property than the owner. I know of one case in the Mojave Desert, where the owner claimed a value, and the lessee claimed the value to be 10 times higher than that claimed by the owner.

Mr. Crouch: The statute provides for the filing of a [2*] declaration of taking, and bringing suit it provides for suing the owners and all persons in interest.

The Court: Having an improvement bond does not make you the owner of the property. It is merely a lien, to which you can resort under certain circumstances. I was judge of the Superior Court for eight years, from 1927 to 1935; I am familiar with the nature of the Voorman Act, and the Mattoon Act. Sometimes one piece of property will have bonds amounting to thousands of dollars, and those bonds are split into small denominations. On my own home, in Hollywood, I have \$1100 in bonds, and there may be 11 owners of bonds. An investment company buys them up, and distributes them, and if I want to ascertain the bondholders, or the County of Los Angeles or the City of Los Angeles or City of San Diego or the County of San Diego, and I can locate the bondholders for every lot.

Mr. Crouch: That is a matter of record.

The Court: I know, but that is not the point.

Mr. Crouch: In the case of *Silberman v. United States*, 131 Fed. (2d) 715, dealing with the question of the lessee, the court said:

Upon condemnation, the condemnor is vested with a complete title, and all interests in the property taken are extinguished.

All persons having any interest in property [3] taken are "necessary parties" to the condemnation proceeding.

* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: That is not a Ninth Circuit case. Remember in condemnation we are not governed by the rules, but we are governed by State law and, therefore, each state has a different rule.

Mr. Crouch: This is a federal case.

The Court: I know, but the federal rules as to condemnation do not apply. You must show me that the bondholder is a necessary party. And you have got to show me a Ninth District case.

Mr. Crouch: In 131 Fed. (2d) 715——

The Court: What page are you reading from? Is that where it says “Upon condemnation, the condemnor is vested”——

Mr. Crouch: Yes.

The Court: That is page 717.

Mr. Crouch: “Upon condemnation, the condemnor is vested with a complete title, and all interests in the property taken are extinguished. All persons having any interest in the property taken are necessary parties to the condemnation proceeding. The principle that the owner of an estate or interest in property condemned is entitled to compensation is not open to dispute. Nor is it doubted that a lessee for a term of years has an interest which must be recognized upon the taking of the property covered by his lease.” [4]

The Court: Yes. But the facts in your record show that an action was brought and the amount awarded diminished the value of your bond. I can't see how it is the government's look-out. Your recourse is against the agency from whom you bought the bond.

Mr. Crouch: In *Jacobs v. U. S.*, 190 U. S. 916, it is said:

“The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suit by the owner did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested on the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such promise was implied because of the duty to pay imposed by the Amendment. The suits were founded on the Constitution of the United States.”

In my brief——

The Court: I have read your brief. I will hear from the other side. I heard you first, because I wanted to know what your theory is. [5]

Mr. Crouch: There is one other thing I wish you would permit me to call to your attention here. That is the case of *Holt v. Collins*, 154 Cal. 265, where it was held by the Supreme Court that there is no principle of law which requires such parties, referring to the necessary parties, to intervene, even though they may have actual knowledge.

Here we have knowledge that these bonds are of record, standing in the name of the plaintiff in this case. The government became the owner of the

property by reason of having filed a declaration of taking, depositing the estimated value in the registry of the court, thereby securing immediate possession. What we had was the right to compensation, and the language of Chief Justice Hughes was that in order to constitute due process of law, he himself must be a party to the case, and they have their day in court. We are left in a position where we are totally without relief.

Mr. Yudelson: These people are not necessary parties, and in the case of *Pomona College v. Dunn*, 7 California Appeals (2d) 227, which involved whether the mortgagee was a necessary party to the proceeding, the court held that he was a proper party, but the court specifically held that he was not a necessary party to the proceeding.

As to the basic question, it has nothing to do this morning with whether or not the plaintiff held a right to compensation, because he has not brought a petition to receive the [6] award, or that portion of the award he alleges is due him out of the funds deposited, or sums to be distributed. He claims the distinct right to sue the United States under USCA 1346, Judicial Code, which is now the Tucker Act. He had actual notice. The records and files of 172 SD show, among other proceedings, that Mr. Thibodo was a witness on May 9, 1944, in a consolidated hearing of 230 SD and 172 SD.

With respect to 172 SD, it was being tried as to the parcels involved herein, to determine compensation before a jury. Mr. Thibodo was a witness,

and sat there in the court room for two days. He knew what the property was. He had actual notice. And under the decision of the California Supreme Court in *Harrington v. Superior Court*, 194 Cal. 188, we feel that the plaintiff is estopped from raising this claim at this time.

I should like to call the court's attention to the case of *Phillips v. United States*, 151 Fed. (2d) 645, in which the factual situation is substantially similar to the one involved here. There the plaintiff, who was a tenant under an oral lease, brought an action under the Tucker Act to recover the value of lands taken. The facts were substantially the same as here. The plaintiff, in the *Phillips* case, appeared on behalf of the landowner, and testified as to the value of the land:

The Court: So far as that point is concerned, under the [7] new rules I cannot consider a motion for summary judgment on any evidence outside of the pleadings themselves.

Mr. Yudelson: In the case of *Mullen Benevolent Corporation v. United States*, 390 U. S. 89, an action was brought under the Tucker Act, to recover a balance due on improvement district bonds on land acquired by the United States. The Idaho act provided that the amounts expended should become liens on the land. The trial court found in favor of the plaintiff and was reversed upon appeal. The Supreme Court of the United States said:

"The bondholder is in equity the owner of the assessment fund and, as the real party in interest,

may, in event of the city's default in collection, enforce the city's right to collect the assessment out of the land. The bonds have no general lien upon the land in the district and save through the assessment no special lien on any tract * * *

“By purchase of the lands, the United States at most frustrated action by the city to replenish the investment fund to which alone the bondholder must look for payment of his bond. But this was not a taking of the bondholder's property.”

As stated, purely and simply, it is our position here that we have not taken their bond.

The Court: All right. [8]

Mr. Crouch: In *Stubbs v. United States*, 21 Fed. Supp. 1007, it is stated:

“The pleadings merely refer to the judgment and decree entered in both the state and federal courts but expressly allege plaintiffs were never parties thereto. If these allegations are true, the judgments are void, because it is elementary that a judgment cannot bind a person who is not a party to the suit.”

The Court: That is true, as a matter of pleading, but you are alleging facts in the case, and I can determine whether you are a necessary party or not. It is only a personal judgment which binds only the party. So the question arises whether you are a necessary party to the action and, second, whether you have that right.

Mr. Crouch: I think under the provisions of 40 USCA 257 it contemplates that the owner and all persons having an interest of record——

The Court: The owner of a bond is not a party having an interest directly. That only applies to the mortgagee and the owner.

Mr. Crouch: The rule provides that the bonds shall be issued in the name of a definite person, and those bonds shall be a lien on the property until paid; that title cannot be transferred except subject to the bonds. [9]

I think I understand something of the nature of condemnation proceedings so far as the government is concerned, and that is that the government is interested in the right as an entirety. It fixes the value of a piece of property, and it is not interested in a person having a common rather than an adverse interest. It provides that the declaration of taking shall be in the name of all persons having any interest. Counsel has devoted considerable time talking about things that are not a matter of record.

The Court: There is no affidavit, under the amendment to the rules which went into effect two years ago. You made your motion to dismiss, filed an affidavit, but that has not been done so I am treating this as an old-fashioned demurrer; but I cannot consider anything *de hors* the record. So I will confine you to the record.

Mr. Yudelsohn: We are not now deciding whether Mr. Thibodo has a right to any part of the award in the condemnation.

The Court: There is no allegation in the complaint that he has been deprived of that.

Mr. Yudelson: It isn't quite clear to me what he is proceeding under.

The Court: It is for the total amount of the bond plus 7 per cent interest.

Mr. Yudelson: That is correct. I call the court's attention [10] to the paragraph 2 which speaks about the Fifth Amendment.

The Court: He has a regular action and also asks for a declaratory judgment. He is not entitled to a declaration of right.

Mr. Crouch: I wish to cite as an authority 28 Judicial Code, Section 1346, subdivision 2, which provides that a suit in the District Court is upon any express or implied contract within the United States, and under the decision in *Jacobs v. United States*, when property has been taken from a man without making him a party, it constitutes a suit under an implied contract.

The Court: The motion to dismiss will be granted. [11]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of August A.D., 1949.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed Sept. 7, 1949.

[Endorsed]: No. 12371. United States Court of Appeals for the Ninth Circuit. F. E. Thibodo, Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed September 30, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals,
for the Ninth Circuit

Case No. 12371

F. E. THIBODO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS RELIED UPON APPEAL AND
DESIGNATION OF THE NECESSARY
RECORD

To the Above Entitled Court and the Clerk Thereof:

As a statement of the Points which the Appellant intends to rely upon on this appeal, the Appellant here adopts the Statement of such points as filed in the United States District Court, Southern District of California, being a part of the record herein.

For a designation of the parts of the Record to be printed, and necessary for a consideration of this appeal, the Appellant designates the entire record.

Dated October 5, 1949.

/s/ GEORGE W. CROUCH,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 6, 1949.

